



University of Kentucky
UKnowledge

Law Faculty Scholarly Articles

Law Faculty Publications

2012

For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning

Michael D. Murray

University of Kentucky Rosenberg College of Law, michael.murray1@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

 Part of the [Legal Writing and Research Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Repository Citation

Murray, Michael D., "For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning" (2012). *Law Faculty Scholarly Articles*. 661.
https://uknowledge.uky.edu/law_facpub/661

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning

Notes/Citation Information

Michael D. Murray, *For the Love of Parentheticals – The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning*, 38 U. Dayton L. Rev. 175-193 (2012).

**FOR THE LOVE OF PARENTHETICALS: THE
STORY OF PARENTHETICAL USAGE IN
SYNTHESIS, RHETORIC, ECONOMICS, AND
NARRATIVE REASONING**

*Michael D. Murray*¹

PROLOGUE..... 175

I. CHAPTER ONE: *CITATIONS’ LOVE OF PARENTHETICALS*..... 180

II. CHAPTER TWO: *SYNTHESIS’ LOVE OF PARENTHETICALS*..... 181

III. CHAPTER THREE: *RHETORIC’S LOVE OF PARENTHETICALS* 183

IV. CHAPTER FOUR: *ECONOMICS’ LOVE OF PARENTHETICALS* 188

V. CHAPTER FIVE: *NARRATIVE REASONING’S LOVE OF PARENTHETICALS* . 192

EPILOGUE..... 193

PROLOGUE

The storyteller approached his audience with care. They were law-trained listeners, well versed in the discourse of their community. The storyteller was a clever fellow, but this was a difficult audience. “Tell us fables,” they roared. Relieved at this request, he began, “Once there was a farmer who . . .” “No,” the crowd interrupted, taking the storyteller by surprise. “Tell us *legal* fables,” they said, “stories with a moral and message that we can apply to future events.” The storyteller scratched his chin thoughtfully for a minute, and started again:

Once there was a large, egg-like creature known as Humpty Dumpty. Humpty ignored the conditions at hand, namely his shape and size and thin, outer shell, and attempted to sit on a wall. This was ill-advised. His size and shape was not conducive to stable placement on a wall. Soon after he had a great fall and broke himself to pieces. Government help arrived soon enough, but nothing could be done to remedy the situation.

¹ Michael Murray, Associate Professor of Law, graduated from Columbia Law School (JD, Harlan Fiske Stone Scholar), Loyola University-Maryland (BA, summa cum laude), and Fudan University, Shanghai (Grad. Cert.). When not writing dramatic works in the law, for example, Michael D. Murray, *Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT*, 8 *LEGAL COMM. & RHETORIC: JAWLD* 217 (2011) [hereinafter Murray, *Rule Synthesis and Explanatory Synthesis*], researches and teaches legal writing and rhetoric at Valparaiso University School of Law. He is the co-author with Professor Christy DeSanctis (George Washington University School of Law) of the LRW Series of texts at Foundation Press, and has written numerous other books, articles, and essays on art law, civil procedure, copyright, first amendment, legal research and writing, and products liability.

The crowd was attentive, hanging on the storyteller's words, so he continued:

Once there was a Foolish Milkmaid who did not concentrate on her task at hand when carrying a pitcher of milk on her head. She let her mind wander to all the things she would do with the money she would obtain when she sold the milk. One idea was to buy a ball gown and go dancing. When she twirled around in her reverie, she spilled the milk all over the ground. Nothing could be done to remedy the situation.

The storyteller seemed to have the crowd under a spell, and he marched on:

There once was a Foolish Dog who had a splendid meaty bone. The dog also was prone to distraction from the task at hand. When he saw his reflection in the river, he mistook it for another dog with another fine bone, and he jumped at the reflection. In the process, he lost the splendid meaty bone he had and wound up with nothing.

A few members of the crowd seemed to have gotten a bit restless, and a bit of murmuring at the back and sides of the crowd was becoming audible, but the storyteller moved on:

The tale of the Three Little Pigs demonstrates the effects, pro and con, of ignoring the facts and circumstances of the task at hand. The first two pigs ignored the facts and circumstances and built dwelling structures that were not able to withstand common wolf invasion. The third pig, having properly assessed the situation and the task at hand, built a solid wolf-proof structure, and he was able to save his own skin and that of his brothers.

The storyteller could tell that the crowd was growing restless, so he hurried into the next story:

Lastly, the Tortoise and the Hare story shows how important it is to assess and follow through on a task, rather than to get distracted and to lose focus. The hare had tremendous advantages of speed, and by all accounts could have lapped the tortoise in any footrace, but the hare allowed his mind to wander and he stopped in the middle of the race for a nap. This allowed the tortoise, who stayed focused on the task at hand, to finish first in the race.

He paused to catch his breath. Sensing the pause, a member of the

crowd spoke up: “That was great, you put in a lot of effort here, but we’ve grown a little tired of hearing all of these words. Time is money, and we are very busy people. We would like you to get to the point faster. The messages of the stories seem connected—there are several underlying themes that tie together the meaning and message of the different stories. Some of us here were trying to write these down, but you went on and on with the separate stories. Isn’t there a way to restate the meaning and message of these separate stories in a short form we easily can copy down on one page?”

The storyteller was dismayed by this request. He knew this was a busy crowd whose expectations demanded clear, concise, and correct work. But one page—it was a lot to ask. The crowd did not like how much time it was taking to go story by story and tell all of the narratives that informed his lesson. But what was he to do? At that very moment, he remembered his love of parentheticals, and he realized that with parentheticals, it could be done. He took up his pen and a clean sheet of paper, and began:

Staying focused on the task at hand is critical to success. *Compare* Humpty Dumpty (failure to focus on requirements of task caused injury), *and* Foolish Milkmaid (same), *and* Foolish Dog (same), *with* Three Little Pigs (party who focused on the requirements of the task at hand succeeded, while parties who did not focus failed), *and* Tortoise and Hare (same). Irreparable harm can come to a person who does not focus on a task. *See* Humpty Dumpty (government officials were powerless to repair damage); Foolish Milkmaid (spilt milk could not be recovered); Foolish Dog (bone dropped in river could not be recovered). Simply staying focused can change the odds greatly in favor of the party who applies the focus. *See* Three Little Pigs (one little pig’s focused effort thwarted wolf who had routed two other little pigs); Tortoise and Hare (incredibly slow reptile was able to win footrace against vastly quicker mammal).

Justice Souter scratched his chin thoughtfully. He was charged with writing the majority opinion in *Campbell v. Acuff-Rose Music*, and he had to explain the effect of multiple authorities that have informed the concept of fair-use and parody.² He wanted to synthesize both primary authorities—statutory sections and judicial opinions—and secondary authorities—scholarly commentary. His drafts of the opinion already seemed long, and he wanted to state the lessons of the authorities succinctly but effectively.

² *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

At that moment, Justice Souter remembered his love of parentheses, and wrote these sections of the opinion this way:

The exclusion of facts and ideas from copyright protection serves that goal [progress of science and arts] as well. *See* § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery..."); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 359, 111 S.Ct. 1282, 1294, 113 L.Ed.2d 358 (1991) ("[F]acts contained in existing works may be freely copied"); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547, 105 S.Ct. 2218, 2223, 85 L.Ed.2d 588 (1985) (copyright owner's rights exclude facts and ideas, and fair use).³

....

...[P]arody, like other comment or criticism, may claim fair use under § 107. *See, e.g., Fisher v. Dees*, 794 F.2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp. 741 (SDNY), *aff'd*, 623 F.2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use); *see also* House Report, p. 65; Senate Report, p. 61, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5678 ("[U]se in a parody of some of the content of the work parodied" may be fair use).⁴

....

...Th[e] [nature of the original work] factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. *See, e.g., Stewart v. Abend*, 495 U.S., at 237-238, 110 S.Ct., at 1768-1769 (contrasting fictional short story with factual works); *Harper & Row*, 471 U.S., at 563-564, 105 S.Ct., at 2231-2233 (contrasting soon-to-be-published memoir with published speech); *Sony*, 464 U.S., at 455, n. 40, 104 S.Ct., at 792, n. 40 (contrasting motion pictures with news broadcasts); *Feist*, 499 U.S., at

³ *Id.* at 575 n.5 (internal citations and bracketing as in original). I am employing a huge dose of artistic license here by imputing emotions regarding parentheses to the author of this Supreme Court majority opinion, Associate Justice David Souter.

⁴ *Id.* at 579-80 (internal citations and bracketing as in original).

348-351, 111 S.Ct., at 1289-1291 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][2] (1993) (hereinafter *Nimmer*); Leval 1116.⁵

This is the story of parenthetical usage in synthesis, rhetoric, economics, and narrative reasoning. My recent empirical study of parenthetical usage in appellate briefs in the United States Supreme Court and in three United States Courts of Appeals⁶ indicates that parentheticals are commonly used in briefs for four rhetorical purposes: to quote or highlight the contents of authorities, to illustrate an explanatory synthesis⁷ of authorities, to illustrate a public policy synthesis of authorities, and to demonstrate narrative synthesis through the storylines of success or failure in relevant authorities.⁸ One of the more notable findings is that every category of parenthetical usage for synthesis is being used in briefs in each federal appellate court and in the United States Supreme Court at a significantly higher rate in terms of numbers of instances of usage than the alternative method of explanation, which is textual, case-to-case analogical reasoning.⁹

From the study, I draw the conclusion that parentheticals are regularly and frequently employed as a rhetorical device to explain the meaning and effect of multiple authorities, including the effect and operation of public policies underlying the law in multiple authorities and the narratives of success or failure among multiple cases in which the law was applied to produce a concrete outcome. In addition, parentheticals in explanatory synthesis are used to explain the lessons and principles that can be induced from multiple authorities at a greater rate than the alternative form of communication of case-to-case analogical reasoning.¹⁰ These findings sustain my thesis that parentheticals in synthesis are rhetorically advantageous as compared to textual, case-to-case analogical reasoning because of their flexibility and efficiency in communicating the lessons and

⁵ *Id.* at 586.

⁶ Michael D. Murray, *The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, 10 LEGAL COMM. & RHETORIC: JALWD 1, 3-5 (forthcoming, 2013), available at <http://ssrn.com/abstract=2225936> [hereinafter Murray, *Promise of Parentheticals*] (text on file with the author).

⁷ Explanatory synthesis is discussed *infra*, at text accompanying notes 16-17.

⁸ Murray, *Promise of Parentheticals*, *supra* note 6, at 3-4.

⁹ *Id.* at 4-5. Case-to-case analogical reasoning devotes one or more paragraphs of text to the explanation of a single authority. When explaining a synthesis of multiple authorities, multiple paragraphs must be employed, and the discussion often will exceed a full page of text. In comparison, this Article will discuss the use of parentheticals as a time- and space-saving alternative to case-to-case analogical reasoning. Note, too, that my empirical study also examined the use of footnoting in briefs, which also exceeded the frequency of use of case-to-case analogical reasoning. Footnoting sometimes overlapped the other uses when an advocate (or judge) would use a footnote to present an explanatory synthesis that used parentheticals, or used a footnote to perform case-to-case analogical reasoning. See generally *id.* at 4-5, 27-30.

¹⁰ See generally *id.* at 4-5.

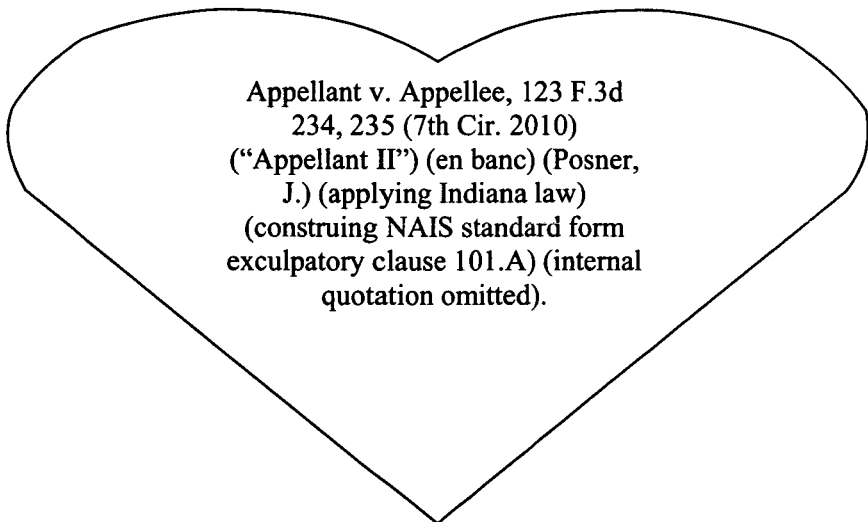
principles induced from multiple, synthesized authorities, and because they follow a mathematical and scientific model of open, demonstrative reasoning that furthers the persuasive potential of parentheticals as a rhetorical tool for legal discourse.

What follows is a substantive discussion of the reasons why parentheticals are rhetorically advantageous—in other words, why they are so beloved and often employed in appellate briefs and cases. I will examine the use of parentheticals in citation forms, synthesis, rhetoric, economics, and narrative reasoning in an effort to trace the attraction.

I. CHAPTER ONE *CITATIONS' LOVE OF PARENTHETICALS*

Citations' love for parentheticals is a desperate love. This relationship is not complicated: parentheticals are an enabler of citation forms, and their relationship has become one of codependency, at least for citation forms. Parentheticals play an indispensable role in American legal citation form.¹¹ They are used to convey explanatory material about authorities including information about the court, the year, and additional information deemed to be important in understanding the weight or value of the authority.

Figure 1 – A citation's valentine



Parentheticals might contain succinct references and bits of

¹¹ See generally ASS'N OF LEGAL WRITING DIRS. & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSION SYSTEM OF CITATION R. 10.4(c), 12.6, 12.10(e), 12.11(a), 12.11(c), 46.0–46.3, 47.5(b), 48.5 (4th ed. 2010); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 498 (Columbia Law Review Ass'n et. al eds., 19th ed. 2010) (index of usage of parentheticals in legal citation).

information to clarify, categorize, or identify the origin, role, placement, nature, or other characteristics of the authority preceding the parenthetical in a citation. Often this information serves to limit or bolster the effect of the authority by indicating that the authority is better or worse than it might appear at face value because of its source (*e.g.*, a potentially controlling court in the proper hierarchy of judicial authority), or timing (*e.g.*, an opinion limited in effect because it preceded a subsequent authority that further changed the law), or author (*e.g.*, an opinion by a particularly distinguished jurist of the jurisdiction, or an opinion by the same judge before whom the present case appears), or aspects of the law (*e.g.*, that an out-of-jurisdiction authority in fact applied the applicable law of the case at bar), or the subject matter (*e.g.*, that the authority construed the exact same exculpatory clause that is to be construed in the case at bar) of the authority cited.¹²

II. CHAPTER TWO

SYNTHESIS' LOVE OF PARENTHETICALS

My own love story with parentheticals began with my work on the organizational paradigm known as TREAT—Thesis-Rule-Explanation-Application-Thesis restated as a conclusion,¹³ and the need to incorporate a method of analysis for the “Explanation” section that would allow for clear, concise, and correct illustration of the lessons induced from multiple primary and secondary authorities that informed the understanding of the proper interpretation and application of the rules at hand. Synthesis is a necessary part of common law legal analysis.¹⁴ In addition to rule synthesis or rule proof—using multiple authorities to define the actual legal rules that govern a legal issue,¹⁵ what the law is, as presented in the “Rule” section of

¹² See, *e.g.*, *supra* Figure 1. Figure 1 reveals these uses of parentheticals to illustrate information to clarify, categorize, or identify the origin, role, placement, nature, or other characteristics of the authority: Appellant v. Appellee, 123 F.3d 234, 235 (7th Cir. 2010) (“Appellant IP”) (en banc) (Posner, J.) (applying Indiana law) (construing NAIS standard form exculpatory clause 101.A) (internal quotation omitted). *Id.*

¹³ MICHAEL D. MURRAY & CHRISTY H. DESANTIS, *LEGAL WRITING AND ANALYSIS* chs. 2, 5, 6 (2009) [hereinafter MURRAY & DESANTIS, *LEGAL WRITING AND ANALYSIS*]; MICHAEL D. MURRAY & CHRISTY H. DESANTIS, *ADVANCED LEGAL WRITING AND ORAL ADVOCACY* App. A (2009) [hereinafter MURRAY & DESANTIS, *ADVANCED LEGAL WRITING*].

¹⁴ See Vivian Grosswald Curran, *Re-Membering Law in the Internationalizing World*, 34 HOFSTRA L. REV. 93, 103–04 (2005); Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH L. REV. 1, 4–5 (2007); Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 210 (2010) (citing A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 152 (A.B.A. 1992)).

¹⁵ Rule synthesis or rule proof is an inductive synthesis of authorities—including, but not limited to, judicial opinions—found to be on point and controlling of a legal question in order to accurately determine and state the prevailing rule of law that governs the issue. See, *e.g.*, MURRAY & DESANTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 2, 5, 6; MURRAY & DESANTIS, *ADVANCED LEGAL WRITING AND ORAL ADVOCACY*, *supra* note 13, at App. A; RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* chs. 10–13 (5th ed. 2005); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING* chs. 4, 6, 9 (3d ed. 2007); HELENE S.

the discourse—my theory was that a second form of synthesis was necessary, not to define what the law on the subject is, but to explain how that law works. My research and study led me to write on the concept of explanatory synthesis, the illustration or advocacy of the proper interpretation or application of the law—in other words, how the law works, as opposed to what the law is.¹⁶

Explanatory synthesis is the part of legal analysis that illustrates the effect and operation of multiple authorities¹⁷ that speak to the proper interpretation or application of the rules. The rhetorical device that enables the illustration to be stated concisely but correctly is the parenthetical.¹⁸ Explanatory synthesis relies on multiple authorities for the purpose of demonstrating how the law should be interpreted and applied in the present circumstances based on how it has been interpreted and applied in multiple, past circumstances.¹⁹ The use of multiple, hopefully numerous, instances of past interpretations and applications of the law is the goal of the “Explanation” section, and the method of explanatory synthesis allows the analysis of multiple legal authorities precisely because it uses parentheticals to express the details from the individual authorities that are necessary to illustrate how each individual authority supports the general proposition induced from these authorities.²⁰

This method is used by judges²¹ and practitioners²² because it is a

SHAPO, ELIZABETH FAJANS & MARY R. FALK, *WRITING AND ANALYSIS IN THE LAW* chs. 2(IV), 5(III) (4th ed. 1999); Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 226–29; Terrill Pollman, *Building A Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 909–10 (2002).

¹⁶ See MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 5, 6; MURRAY & DESANCTIS, *ADVANCED LEGAL WRITING*, *supra* note 13, at App. A; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1.

¹⁷ I am specifically referring to “authorities” and not simply to “cases” because explanatory synthesis properly induces definitional rules, interpretive rules, and principles about the proper interpretation and application of the law from primary and secondary authorities—constitutions, statutes, administrative law, cases, and scholarly commentary. On definitional rules and interpretive rules, see *infra* notes 39–40 and accompanying text.

¹⁸ This statement summarizes my recent research and scholarship on synthesis and legal rhetoric and the role of parentheticals in the discourse. Michael D. Murray, *After the Great Recession: Law and Economics’ Topics of Invention and Arrangement and Tropes of Style*, 58 LOY. L. REV. (forthcoming Winter 2012) [hereinafter Murray, *After the Great Recession*], available at <http://ssrn.com/abstract=2012963>; Michael D. Murray, *Explanatory Synthesis and Rule Synthesis: A Comparative Civil Law and Common Law Analysis*, 83–84 BAĞÇEŞEHİR ÜNİVERSİTESİ HUKUK FAKÜLTESİ-KAZANCI HUKUK DERGİSİ 139 (2011) [hereinafter Murray, *Explanatory Synthesis and Rule Synthesis*] available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012974; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1.

¹⁹ See Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 234–37. See generally MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at ch. 6; MURRAY & DESANCTIS, *ADVANCED LEGAL WRITING*, *supra* note 13, at App. A.

²⁰ See Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 234–40; see also MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 6, 7; MURRAY & DESANCTIS, *ADVANCED LEGAL WRITING*, *supra* note 13, at chs. 2, 3, 4, 6, & App. A (gives various examples of the use of parentheticals in explanatory synthesis).

²¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 n.5, 579–80, 586 (1994); see also *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (internal citations as in original):

practical, flexible, and efficient method of explaining the lessons of multiple, synthesized authorities, especially precedent cases.²³ The use of parentheticals in explanatory synthesis fits the requirements and expectations of the entire legal writing discourse community—including judges and practitioners—because it is a method of analysis and advocacy that demonstrates how the law will or should produce an outcome in a certain situation based on inductive syntheses of authorities that reveal how the law has operated in past situations.²⁴

III. CHAPTER THREE

RHETORIC'S LOVE OF PARENTHETICALS

The use of parentheticals in explanatory synthesis is a device of modern legal rhetoric that constructs knowledge and understanding of the role of precedents on the legal issue, persuading the audience as to the correctness or superiority of the attorney's knowledge and understanding of how the law works, and seeking to motivate the audience to act in the rhetorical situation of the discourse.²⁵

Explanatory synthesis is an inductive use of precedent in discourse

We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work. *See Davis*, 246 F.3d at 174 (use of plaintiff's eyewear in a clothing advertisement not transformative because it was "worn as eye jewelry in the manner it was made to be worn"); *Castle Rock Entm't*, 150 F.3d at 142-43 (quiz book called the "*Seinfeld* Aptitude Test" not transformative when its purpose was "to repackage [the television show] *Seinfeld* to entertain *Seinfeld* viewers"); *Ringgold v. Black Entm't Television, Inc.* 126 F.3d 70, 79 (2d Cir.1997) (copy of plaintiff's painting used as decoration for a television program's set not transformative because it was used for "the same decorative purpose" as the original).

See also Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 & n.19 (9th Cir. 2003) (internal citations as in original):

Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (concluding that retransmission of radio broadcast over telephone lines is not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000) (finding that reproduction of audio CD into computer MP3 format does not transform the work); *Los Angeles News Serv.*, 149 F.3d at 993 (finding that reproducing news footage without editing the footage "was not very transformative").

See also Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609, 610 (2d Cir. 2006); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 804 (9th Cir. 2003).

²² *See Michael D. Murray, The Promise of Parentheticals: An Empirical Study of the Use of Parentheticals in Federal Appellate Briefs*, 10 LEGAL COMM. & RHETORIC: JALWD 1, 3-5 (forthcoming, 2013) [hereinafter Murray, *The Promise of Parentheticals*], http://works.bepress.com/michael_murray/7 (This is a large-scale study of the use of parentheticals in practitioners' briefs for quotation, explanatory synthesis, public policy synthesis, and narrative synthesis.).

²³ Authors have described parentheticals as a necessary component of legal discourse. *E.g.*, Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 176 (2010); Ira P. Robbins, *Semiotics, Analogical Legal Reasoning, and the Cf. Citation: Getting Our Signals Uncrossed*, 48 DUKE L.J. 1043, 1076-79 (1999).

²⁴ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 140.

²⁵ *Id.*

that requires a demonstrative and persuasive presentation of how the law should be interpreted and applied. “Explanatory synthesis as a form of legal analysis relies on the open, scientific, inductive structure of the analysis and the use of multiple precedents for the accuracy and reliability of its predictions and conclusions.”²⁶ Rhetorically, explanatory synthesis relies on the structure of mathematical-scientific induction within a familiar deductive syllogistic structure, and on the open, demonstrative, and falsifiable analysis of multiple authorities both to create knowledge and understanding and for persuasive advocacy.²⁷ Parentheticals are crucial to the structure, because they allow open demonstration of the material drawn from multiple cases cited in a string cite to support the proposition induced from the multiple authorities.

The structure of an explanatory synthesis has three parts:

Figure 2 – Explanatory Synthesis Components

Principle	Citations	Parentheticals ²⁸
-----------	-----------	------------------------------

Each synthesis has one principle supported by multiple citations to authorities, and each citation has a parenthetical that explains in as few words as possible the facts and circumstances and outcome of the case relevant to the application of the rule. Thus the complete structure is the following:

Figure 3 – Detailed Structure of Explanatory Synthesis

Interpretive Principle induced from Authorities 1, 2, and 3—
 Citation to Authority 1 (details concerning the application of the rule or public policy in Authority 1 that illustrate the Interpretive Principle); Citation to Authority 2 (details concerning the application of the rule or public policy in Authority 2 that illustrate the Interpretive Principle); Citation to

²⁶ *Id.* at 142.

²⁷ *Id.*

²⁸ See Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 157; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 221–22. Each part is necessary: the principle stated is the product of the induction. It reveals the interpretive principle concerning how the rules are to be interpreted and applied based on the case examples cited in the synthesis. See Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 157; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 221–22. The citations are necessary to show that the principle is supported by multiple authorities. See Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 157; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 221–22. All of the parts must be stated openly because this is demonstrative reasoning, open to examination and refutation, and thus highly persuasive if it is not rebutted. See Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 157; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 221–22; see also MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at ch. 6.

Authority 3 (details concerning the application of the rule or public policy in Authority 3 that illustrate the Interpretive Principle); and so on.²⁹

Rhetoricians have good reason to love parentheticals because they allow the author to give just enough information (facts, public policy, or other relevant details) as is necessary to demonstrate how the authority supports the proposition.³⁰ For example, in a synthesis of four copyright fair-use cases from the United States Court of Appeals for the Second Circuit—*Salinger v. Colting*,³¹ *Blanch v. Koons*,³² *Castle Rock Entertainment v. Carol Publishing Group*,³³ and *Leibovitz v. Paramount Pictures*³⁴—parentheticals may be used to openly demonstrate the specific facts of each case and to describe how those facts interacted with the public policies of copyright law in general and copyright fair-use law in particular, in order to distinguish a use that is held to exploit the original material copied for the same purposes and toward the same ends as the original work³⁵ as compared to uses where the second work changed the character, nature, and purpose of the original material in such a way that the original work was not exploited in any manner contrary to the public policy of copyright law that promotes the creation of original works.³⁶ Using parentheticals, the cases might be synthesized as follows:

Figure 4 – Example of Parentheticals Illustrating Explanatory Synthesis

A use that exploits the original material copied for the same purposes and toward the same ends as the original work will not be a fair use of the original work, but a second work will be a fair use if it changes the character, nature, and purpose of the original material in such a way that the original work is not exploited in any manner that is contrary to the public policy of copyright law that promotes the creation of original works. Compare *Salinger*, 607 F.3d 68 (60 Years Later-Coming Through the Rye held to exploit the same themes, same story arc, same characters, and same situations as the original work,

²⁹ The principle is a statement concerning the proper application of the rule induced from cases. The citations are to the authorities from which the principle is induced. Parentheticals are provided for each citation to explain and illustrate how the authority supports the principle. See MURRAY & DESANTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at ch. 6; Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 157.

³⁰ See MURRAY & DESANTIS, *LEGAL WRITING & ANALYSIS*, *supra* note 13, at ch. 6 (explaining the methodology and giving examples); Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 161.

³¹ 607 F.3d 68 (2d Cir. 2010).

³² 467 F.3d 244 (2d Cir. 2006).

³³ 150 F.3d 132 (2d Cir. 1998).

³⁴ 137 F.3d 109 (2d Cir. 1998).

³⁵ See *Salinger*, 607 F.3d 68; *Castle Rock*, 150 F.3d 132.

³⁶ See *Blanch*, 467 F.3d 244; *Leibovitz*, 137 F.3d 109.

Catcher in the Rye, and was held not to be fair), and *Castle Rock*, 150 F.3d 132 (*Seinfeld* trivia book held to exploit the original material from the *Seinfeld* television show for the same purposes—comedy and entertainment—for which the original material was created, and was held not to be fair), with *Blanch*, 467 F.3d 244 (Jeffrey Koons' work, *Niagara*, transformed the content, context, and meaning of Blanch's original fashion photograph in a manner that completely changed the theme and purpose of the work from one of fashion and allure to one that critically commented on our society's hungers and appetites, and was held to be fair), and *Liebovitz*, 137 F.3d 109 (*Naked Gun* movie ad changed the content, context, and meaning of the original photograph from one of serious, artistic photography celebrating classical beauty to one of a spoof of beauty when the original female star's head was replaced on her body by the head of a famous male comedian, and was held to be fair).

In rhetorical discourse in a common law system, authorities must be reconciled for their explicit statements and pronouncements of the governing legal standards as well as examined for implicit requirements that are induced from the controlling authorities.³⁷ Legal analysis employs synthesis of the rules to make a single coherent statement of the applicable legal principles that govern the legal issue at hand, and this becomes the “R” (Rule) section of the discourse, or the first half of the major premise of the legal reasoning syllogism.³⁸ Rule synthesis is used to formulate the governing legal standards on an issue of law, including both the definitional rules³⁹ and interpretive rules⁴⁰ from the authorities. The doctrine of rule

³⁷ See Curran, *supra* note 14, at 104; Gionfriddo, *supra* note 14, at 4; Valentine, *supra* note 14, at 210; A.B.A. TASK FORCE ON LAW SCH. & THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 152 (A.B.A. 1992).

³⁸ See MURRAY & DESANCTIS, LEGAL WRITING & ANALYSIS, *supra* note 13, at chs. 2, 5, 6. The second half of the major premise of the syllogism is represented by the “E” or “Explanation” section. *Id.*; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 219–220. On syllogistic structure, see MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, *supra* note 13, at chs. 2, 5, 6; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 219–20. On the “R” and “E” sections of typical structural paradigms—TREAT, IREAC, or CREAC—see generally LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, chs. 10, 11, 19, 20 (5th ed. 2010) (discussing IREAC and variations for objective and persuasive discourse); MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, *supra* note 13, at chs. 2, 6, 7 (discussing IRAC and TREAT); James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 719–23 (2006) (discussing IRAC); see generally Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 484–87, 492 (2003) (discussing IRAC, IREAC, and CREAC).).

³⁹ A definitional rule defines a legal rule or legal standard providing the terms, elements, or requirements of the rule or standard. MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, *supra* note 13, at chs. 4, 5. For example, in United States copyright law, the rule defining parody as a form of comment and criticism under 18 U.S.C. § 107 (2011) is a definitional rule, as is the definition of “parody” as the use of some elements of a prior author's work to create a new one that, at least in part, comments on or criticizes the original author's work. See *Campbell v. Acuff Rose Music*, 510 U.S. 569, 579–80 (1994).

synthesis or rule proof is premised on the theory that in a common law system, case law and administrative law can and do alter the contents and requirements of the law, thus making it necessary to consider and synthesize multiple sources that apply to the issue.⁴¹ The authorities can be constitutional, statutory, regulatory, administrative, or case law, but they must be binding, mandatory authority as to the tribunal, the parties, and the parties' issue so that they can define the rules on the issue.⁴²

While rule synthesis is the component of common law legal analysis that determines what legal standards apply to and control a legal issue, explanatory synthesis seeks to demonstrate and communicate how these legal standards work in various situations relevant to the legal issue at hand.⁴³ Explanatory synthesis does not require exclusively controlling authorities for its analysis.⁴⁴ Explanatory synthesis seeks to demonstrate how the law has worked in prior situations in order to provide guidance to the audience of the discourse in the current situation, and uses parentheticals to provide the details regarding the disposition of legal issues in these specific, concrete situations rather than using them as dispositive authority on the rules governing the issue.⁴⁵ "The analysis and predictions formed in explanatory synthesis may be stronger and more persuasive if the [authorities] used in the synthesis are themselves binding authority with respect to certain legal issues before the tribunal, but it is equally important to use adequate numbers of relevant, analogous [authorities] in the synthesis."⁴⁶

Parentheticals play a crucial rhetorical role in explanatory synthesis by providing the information that ties together the multiple authorities cited and allowing the demonstration of the facts, public policies, and application

⁴⁰ An interpretive rule is a rule issued by a court or provided in another primary legal authority (constitution, statute, or administrative rule or regulation) that instructs attorneys and judges on the proper interpretation and application of a definitional rule. MURRAY & DESANTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 4, 5. For example, the rules that the United States copyright fair use factors of 17 U.S.C. § 107 are to be weighed together in a case-by-case analysis in light of the purposes of copyright law where no one factor predominates over the other factors, and commercial usage is simply one factor to be weighed with the others and is not a dispositive factor, all are interpretive rules created by the United States Supreme Court that instruct the lower courts and the copyright bar as to how the copyright fair use factors are to be interpreted and applied. *See Campbell*, 510 U.S. at 577–78, 584–85.

⁴¹ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 143–44.

⁴² Even absent case law, rule synthesis is used to combine and reconcile different legal authorities on an issue. Constitutional law may affect statutory law or administrative and regulatory law, and even within a category, an issue may implicate several statutory code provisions, which must be coherently reconciled through rule synthesis. An example in United States copyright law is the need to synthesize references to 17 U.S.C. §§ 101, 106, 106A, and 107 in order to determine fair use or infringement of copyrighted works, and to determine if a work is protected by the American Visual Artists Rights Act.

⁴³ *See* MURRAY & DESANTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 6, 7 (discussing explanatory synthesis); Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 226–30 (same).

⁴⁴ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 145.

⁴⁵ *Id.*

⁴⁶ *Id.* at 146.

of the law in each of the authorities that support the proposition drawn from these authorities. In the absence of parentheticals, the cases are cited alone, on faith, rather than in open demonstration of the factual, public policy, or narrative support for the proposition stated. Rhetorically, the use of parentheticals supports the credibility of the proposition because the supporting facts, policy, and details of the application of the law are open for examination and potentially for rebuttal. This is the rhetorical concept of falsifiability that makes open, demonstrative reasoning so persuasive in analysis or advocacy. If the openly demonstrated analysis is not refuted, it is held to be conclusive when the premises are capable of conclusive determination; in other words, the proof is absolute when both premises are absolutely and necessarily true, as in a true syllogism. When the premises are not susceptible to conclusive determination, as in most instances of legal analysis where the facts and the law are not susceptible to absolute certainty of determination, the syllogistic structure is still held to be highly persuasive because the premises are openly demonstrated and exposed to examination and refutation both as to the probability and accuracy of the statement of the premises and the probability and reliability of the conclusion drawn from the premises.⁴⁷ Parentheticals allow the supporting details to be stated openly in a clear, succinct format.⁴⁸

IV. CHAPTER FOUR *ECONOMICS' LOVE OF PARENTHETICALS*

Law and economics is a school of modern legal rhetoric.⁴⁹ The practitioners of law and economics—those who follow the neoclassical and the contemporary approaches⁵⁰—rely on the inherent persuasiveness of mathematics and the methodologies of scientific proof both as a method of analysis and as a form for the demonstration of the analysis.⁵¹ Members of the economic disciplines hold themselves out as scientists, applying logical, scientific deduction and induction to *prove* propositions.⁵² The syllogism

⁴⁷ Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 226; Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 170.

⁴⁸ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 161; Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 226.

⁴⁹ See generally Michael D. Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 LOY. L. REV. 615, 620, 628–29, 633 (2012).

⁵⁰ For a discussion of “new” or “neoclassical” law and economics as compared to contemporary law and economics, influenced by law and behavioral sciences, see *id.* at 3 & n.2.

⁵¹ See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 3–4 (Denise Clinton ed., 5th ed. 2008); Robert L. Heilbroner, *Rhetoric and Ideology*, in ARJO KLAMER, DONALD N. MCCLOSKEY & ROBERT M. SOLOW, THE CONSEQUENCES OF ECONOMIC RHETORIC at 38–39 (1988) [hereinafter Heilbroner, *Rhetoric and Ideology*]; Herbert M. Kritzer, *The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom*, 72 LAW & CONTEMP. PROBS. 41, 42–43, 59 (2009).

⁵² GEORGE PÓLYA, INDUCTION AND ANALOGY IN MATHEMATICS: VOLUME I OF MATHEMATICS AND PLAUSIBLE REASONING v–vi (1954); Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 760 (1988) [hereinafter McCloskey, *Rhetoric of Law and Economics*]. The pros and cons of this rhetorical imperative are a lively topic of debate, and one that is growing in the wake of

and enthymeme (deductive forms) and the induction and example (inductive forms) are topoi of invention and arrangement in science, mathematics, and rhetorical demonstration.⁵³

Math and science help to confirm the analytical and rhetorical value of the parenthetical in synthesis because parentheticals allow the elegant and efficient presentation of interpretive principles drawn from multiple samples of dispositions of similar cases to guide and persuade the audience as to the disposition of the present case.⁵⁴ The numeric advantage of explanatory synthesis is combined with the scientific and mathematical structure of the analysis that presents its reasoning in an open, demonstrative format for examination and potential refutation of the components of the analysis.⁵⁵ It is this openness and potential for examination and rebuttal that produces the persuasive element of falsifiability in explanatory synthesis.⁵⁶ When an opponent or other participant in the case does not rebut a synthesis, it stands as highly reliable and persuasive.⁵⁷

Figure 5 – Numeric Rhetorical Advantage of Explanatory Synthesis using Parentheticals⁵⁸

the economic meltdown of 2009–10. *E.g.*, Samuel Gregg, *Smith versus Keynes: Economics and Political Economy in the Post-Crisis Era*, 33 HARV. J.L. & PUB. POL'Y 443, 445, 451–52, 455–56 (2010).

⁵³ The structural form of pure logic and scientific or mathematical proof is the syllogism, while the structural form of rhetorical demonstration and legal argument is the enthymeme. *See* ARISTOTLE, *THE RHETORIC*, Bk. I, ch. 1, at 1355a (W. Rhys Roberts trans. 1965). The deductive structure of the syllogism and enthymeme provides the framework for each of the organizational paradigms of legal discourse, including IRAC, IREAC, and TREAT. LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, chs. 10, 11, 19, 20 (5th ed. 2010) (discussing IREAC and variations for objective and persuasive discourse); MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at chs. 2, 6, 7 (discussing IRAC and TREAT); James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 719–23 (2006) (discussing IRAC and IREAC); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 484–87, 492 (2003) [hereinafter Robbins, *Paradigm Lost*] (discussing IRAC and IREAC).

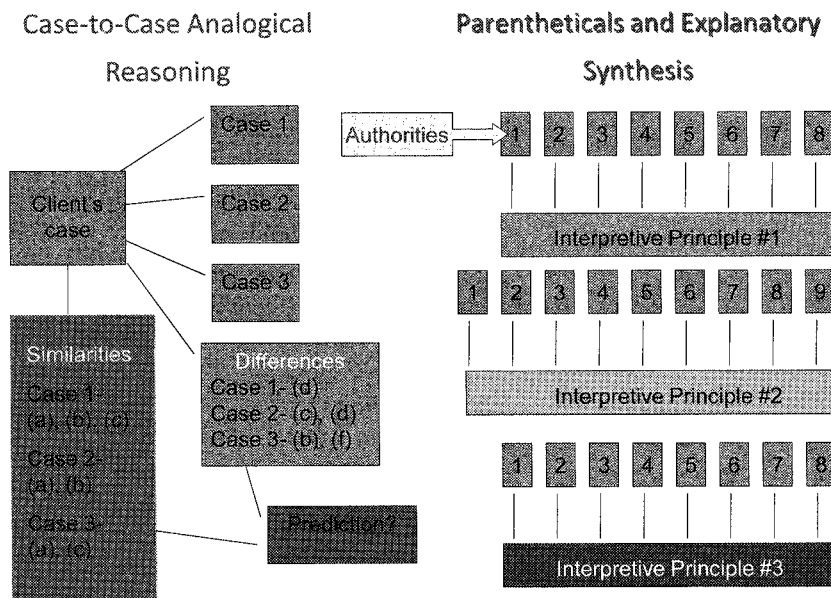
⁵⁴ *See* Murray, *After the Great Recession*, *supra* note 13, at 26–28.

⁵⁵ *Id.*

⁵⁶ *Id.* at 41. Explanatory synthesis informs the major premise of the deductive, syllogistic structure of the discourse through induction of principles concerning how the rules should be interpreted and applied. The process of induction finds a general proposition to be true because of its relationship to a number of other specific propositions that are known to be true. A certain genus of situations with identifiable characteristics can be defined from a synthesis of known situations (“species” of situations, or “precedents”) that all share these characteristics. *See* Christof Rapp, *Aristotle's Rhetoric* §§ 5(C), 7.4, in Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Summer 2002 ed.), available at <http://plato.stanford.edu/archives/sum2002/entries/aristotle-rhetoric/> (May 2, 2002).

⁵⁷ *See* Murray, *The Great Recession and Rhetorical Canons of Law and Economics*, *supra* note 49, at 19–21; *see also* Christof Rapp, *Aristotle's Rhetoric*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* §§ 5(C), 7.4 (May 2, 2002), <http://plato.stanford.edu/archives/sum2002/entries/aristotle-rhetoric>.

⁵⁸ *See* MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, *supra* note 13, at 168.



The alternative to parentheticals in legal discourse is textual analogical explanations. It is possible to use a string of paragraphs of text to quote the contents or explain the effect of multiple authorities. This one-to-one comparison of the client's legal situation or storyline of a single precedent follows a familiar methodology of analogical reasoning: if the situation and storyline of the client's case is the same as the situation and storyline of the precedent, the ending of the story (the outcome and disposition) should also be the same in both cases. Analogical reasoning is essential in a common law system defined by precedent. The question is, is the use of case-to-case analogical reasoning through textual explanation rhetorically superior to the use of parentheticals for explanatory, analogical, and narrative reasoning?

Parentheticals are key to the rhetorical power of explanatory synthesis because they allow succinct but elegantly detailed supporting information to be provided after each authority.⁵⁹ Parentheticals are not bound by grammatical conventions so that only the necessary and sufficient information need be put before the reader. This results in discourse that is attractive in an elegant, succinct format that is reader-friendly in its conservation of space and the time required for the consumption of the discourse, and persuasive for providing open, demonstrative support, rather than relying on trust or other indicia of the ethos of the author, if such

⁵⁹ See Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 168-69.

indicia are present.⁶⁰

The syllogistic and inductive structures of TREAT, IREAC, or CREAC employing explanatory synthesis are the same structures used in mathematical and scientific proof.⁶¹ The very concept that the components of a legal argument can be phrased in the form of an induction and a syllogism taking the form of a proof enhances the persuasiveness of the discourse. This is both rhetorically and substantively advantageous because the power of the mathematical and scientific forms of proof lies in their open demonstration of the steps and components of the analysis in a transparent and falsifiable presentation.⁶² Explanatory synthesis further incorporates the advantages of mathematics and science by increasing the number of authorities that can efficiently be analyzed in the discourse and from which the principles of interpretation can be induced, thus increasing the reliability of the analysis. Explanatory synthesis in effect increases the number—the “n”—of the sample set, which increases the reliability and persuasiveness of the principles induced from that sample set. Because the method allows for exposition of many interpretive principles using multiple authorities in a comparatively small amount of space (roughly one-third to one-half page per synthesis, depending on the number of authorities synthesized and the length and complexity of the parentheticals required), explanatory synthesis provides an elegant solution to the rhetorical problem of the client’s situation, which is preferred by mathematics and science.⁶³

Explanatory synthesis performs an open demonstration of the analysis of multiple authorities as an incentive to the reader. The reader is invited to avoid the cost of delving into such a large number of authorities because the work of the analysis has been performed openly, subject to examination and refutation. “Opaque or unsubstantiated reasoning, overworking or stretching an analogy to a precedent that is not closely aligned to the client’s narrative and rhetorical situation, imposes a cost on the reader who must take the time to unpack the analogy, evaluate whether it is analogous, and still might have to invest the time to compare the analogy to other controlling authorities that also are on point.”⁶⁴

Case-to-case analogical reasoning requires at least one and more often several paragraphs of text to explain and illustrate the effect of a single authority. If multiple authorities are to be explained, the author must devote a page or more of text to the process of analogizing to or distinguishing the

⁶⁰ Murray, *The Great Recession and Rhetorical Canons of Law and Economics*, *supra* note 49.

⁶¹ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 169.

⁶² *Id.* at 169; see generally Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 241–42.

⁶³ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 169; see Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 241–42.

⁶⁴ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 169; see Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 236–37.

authorities. Authors necessarily will be pressured by page-limits and audience attention span to limit the numbers of authorities that will be examined or explained to advocate their analysis of the situation.

V. CHAPTER FIVE

NARRATIVE REASONING'S LOVE OF PARENTHETICALS

The analogical and rhetorical use of precedent cases as a source of narrative forms and “stories” in the law is well recognized in American legal method.⁶⁵ Precedent cases contain a story, and multiple precedents can contain the same storyline or directly related and analogous storylines. In American legal method, an attorney often relates her client’s situation to one or more of the precedent storylines if the outcome of the stories is favorable to the client; by the same token, an attorney will attempt to tell a new story of the client to distinguish one or more precedent cases whose stories do not support a favorable disposition of the client’s case.⁶⁶

Parentheticals are both an effective and an efficient substitute for textual, case-to-case analogical comparisons to support narrative reasoning. They may be used to quote or highlight portions of the authority or summarize the plot, character types, or story arc so as to bring out the exact relevance of the authority to the analysis. They may be used to explain and demonstrate the operation of the public policies of the area of law that is implicated by the storylines in multiple authorities. And parentheticals may be used to demonstrate and illustrate successful and unsuccessful narratives (the storylines of “winners” and “losers”) under the applicable rules and standards of the case at hand.

⁶⁵ See, e.g., Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 266–69, 307 (2009); Douglas M. Coulson, *Legal Writing and Disciplinary Knowledge-Building: A Comparative Study*, 6 J. ASS’N L. WRITING DIRS. 160, 167–68, 195–97 (2009); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 220–21.

⁶⁶ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 148–49. This discussion merely scratches the surface of the theory and practice of the story-telling movement and narrative reasoning discipline in legal analysis, but for further reading, I offer the following sources: ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113–14 (2000); DAVID RAY PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1991); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Berger, *supra* note 65; Jerome Bruner, *Life as Narrative*, 71 SOC. RES. 691, 692 (2004); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Foley & Robbins, *supra* note 65; J. Christopher Rideout, *So What’s in a Name: A Rhetorical Reading of Washington’s Sexually Violent Predator’s Act*, 15 U. PUGET SOUND L. REV. 781 (1992); Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 L. WRITING: J. L. WRITING INST. 3 (2008); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767 (2006); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 717 (1994); JAMES BOYD WHITE, *READING LAW AND READING LITERATURE: LAW AS LANGUAGE, IN HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 77 (1985).

Because of the elegance and efficiency of parentheticals compared to direct case-to-case analogical reasoning, explanatory synthesis does not put all of the rhetorical eggs in one or two baskets by relying on the principles of interpretation and application that can be learned from only one or two narratives in precedents. It can present a series of interpretive principles to address many different audiences and situations, and support the principles with a larger number of authorities.⁶⁷ As shown in the examples above, many authorities might be synthesized on a single page of text to substantiate and apply a greater number of interpretive principles so as to make a more persuasive discourse.

Parentheticals allow for the demonstration of patterns of narratives and storylines found in more than one authority so as to appeal to the values and preferences of the modern, rational audience, and do so in an elegant, time-, and space-saving format. The typical legal audience is prone to the same biases and heuristics as any audience of decision-makers, and explanatory synthesis creates opportunities to anticipate and target audience biases or shortcuts.

EPILOGUE

The story ends as it began, with love and affection for parentheticals. Parentheticals in synthesis are rhetorically advantageous as compared to case-to-case analogical reasoning because of their flexibility and efficiency in communicating the lessons and principles induced from multiple, synthesized authorities, and follow a mathematical and scientific model of open, demonstrative reasoning that furthers the persuasive potential of parentheticals as a rhetorical tool for legal discourse. They may be used to support narrative reasoning from the related or connected storylines of prior cases and to perform direct analogical reasoning from precedents. The numeric advantage of parentheticals makes them especially lovely because their elegant and efficient use of space does not squander the reader's attention span, yet they allow the reasoning and analysis to be supported by a greater number of authorities than is easy or efficient to employ in case-to-case analogical reasoning. What's there not to love?

⁶⁷ Murray, *Explanatory Synthesis and Rule Synthesis*, *supra* note 18, at 169; see Murray, *Rule Synthesis and Explanatory Synthesis*, *supra* note 1, at 237.

